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INDERA CONSTRUCTION SDN BHD

v.

PNS DEVELOPMENT SDN BHD

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HIGH COURT MALAYA, PULAU PINANG
S NANTHA BALAN JC
[ORIGINATING SUMMONS NO: 24-2218-12-2012]
14 AUGUST 2014

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ARBITRATION: *Arbitrator - Misconduct - Allegation of - Bifurcated arbitral proceedings - First stage dealt with liability and second stage dealt with quantum - Whether arbitrator decided quantum at first stage - Whether rulings at first stage was res judicata - Whether quantum to be proven at second stage - Whether issue on quantum fell within jurisdiction or arbitrator - Whether court could interfere - Whether mishandling of arbitration process proven - Arbitration Act 1952, s. 24(2)*

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ARBITRATION: *Award - Setting aside - Application for - Whether issues raised fell within jurisdiction of arbitrator - Whether decision proper - Whether allegation of bias or dishonesty proven - Whether sufficient cause for court's interference arose - Arbitration Act 1952, s. 24(2)*

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The plaintiff was appointed by the defendant as a main contractor to build houses. Subsequently disputes arose between the plaintiff and the defendant which led to the issuance of a notice of determination by the defendant. The plaintiff commenced arbitration proceedings to declare the notice of determination as invalid and other consequential reliefs. By consent of the parties, the proceedings were bifurcated wherein the arbitrator dealt initially with liability ('stage one') and thereafter the assessment of damages ('stage two'). The original arbitrator was not able to proceed with the hearing at stage two and therefore a substitute arbitrator was appointed. At stage one, two preliminary issues were raised for the determination of the original arbitrator *ie*, (i) whether there was in existence a supplementary agreement concluded; and (ii) if so, whether the notice of determination of the contract was lawful. The original arbitrator confined himself to the two issues and did not deal with any issue with regards to the quantum of damages or the monetary value of the work that was done by the plaintiff. By an interim award, the original arbitrator found that the supplementary agreement did exist and further held that the notice of determination was bad in law and amounted to a repudiatory breach of contract and ruled that the plaintiff had achieved 93.43% progress of work as at the date of termination of the contract. At stage two, the plaintiff contended

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that the quantum was implicitly determined during stage one and the defendant should not be allowed to adduce evidence so as to expressly or impliedly re-open the percentage of progress of works. However, the substitute arbitrator ruled that the original arbitrator had not made a ruling on quantum and that the issue of quantum was, at large and extant, in stage two of the arbitration proceedings. Dissatisfied, the plaintiff challenged the rulings in the High Court and sought to have the substitute arbitrator removed for misconduct and bias ('notice of motion'). The application was, however, dismissed and the plaintiff did not appeal against the decision and resumed to the arbitration proceedings for completion before the substitute arbitrator. The substitute arbitrator ruled that the plaintiff had not adduced any compelling evidence that showed that 93.43% in progress of works amounts to 93.43% of its entitlement for the work done under the contract and that based on the evidence, the value of work done by the plaintiff was only 80.12% of the contract value. Hence, the application by the plaintiff pursuant to s. 24(2) of the Arbitration Act 1952 ('the Act') to set aside the final award by the substitute arbitrator on the grounds that the substitute arbitrator was biased and had committed misconduct in the course of the arbitration proceedings in respect of the assessment of damages.

Held (dismissing plaintiff's application):

(1) The plaintiff's decision not to challenge the correctness of the High Court's decision dismissing the notice of motion would mean that the plaintiff had expressly or implicitly accepted the correctness of the decision. That was, in itself, sufficient to render the two rulings *res judicata* for purposes of stage two of the arbitration. (paras 47 & 48)

(2) When viewed as a whole and taking into account all the circumstances, the substitute arbitrator did not commit any error of law as he had correctly held that the issue of progress of work of 93.43% which was determined by the original arbitrator was *res judicata* and could not be re-opened or revisited. However, that, in and of itself, did not absolve the plaintiff of the burden of proving, to the satisfaction of the substitute arbitrator, the monetary value of the work that had been completed. The issue of quantum was a separate matter and the plaintiff could not take refuge in the principle of *res judicata* to avoid proving the value of quantum of damages in stage two. (paras 70 & 91)

(3) The bifurcated nature of the arbitral proceedings and the agreement of the parties that damages was to be kept separate from liability did not obviate the need for the plaintiff to prove, by credible, cogent and convincing evidence, that 93.43% progress of work equated to 93.43% of the contract value. The plaintiff could have but chose not to tender any tangible empirical evidence of their own to establish the monetary value of their claim or to satisfy the substitute arbitrator. Therefore, the substitute arbitrator could not be faulted for relying on the tangible empirical evidence that was adduced by way of detailed measurement report tendered by the defendant. (paras 71 & 91)

(4) It was plain that the plaintiff had failed to discharge its burden of proving the value of work contractually completed by the plaintiff and this was par excellence a matter which fell within the province and jurisdiction of the substitute arbitrator and it was not part of this court's function to interfere with the decisions validly, honestly and properly made by the substitute arbitrator. Even if the substitute arbitrator had made errors of fact or of law, that in itself would be insufficient for this court to exercise jurisdiction over the final award and to set it aside under s. 24(2) of the Act. (paras 85 & 86)

(5) In the absence of any hint of bias or dishonesty or any manifestation of mishandling of the arbitral process, it was obvious that there was no breach of natural justice. An inference of bias could not be made merely because the interim rulings leaned largely in favour of the defendant. The suggestion by the plaintiff that the substitute arbitrator could not be unbiased because of the challenge to the interim rulings and the plaintiff's application to remove him for misconduct was misconceived. (paras 87 & 88)

Case(s) referred to:

AC Ho Sdn Bhd v. Ng Kee Seng [1998] 2 CLJ 645 CA ***(refd)***

Anwar Siraj And Another v. Ting Kang Chung And Another [2003] 2 SLR 287 ***(refd)***

Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor [1999] 2 CLJ 788 CA ***(refd)***

Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd [2004] 1 CLJ 743 FC ***(refd)***

John v. Dharmaratnam [1961] 1 LNS 35 CA ***(refd)***

Lau Tiong IK Construction Sdn Bhd v. The Government Of Malaysia [2007] 1 LNS 420 HC ***(refd)***
Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors [2006] 1 CLJ 1 CA ***(refd)***
Lian Hup Manufacturing Co Sdn Bhd v. Unitata Bhd [1994] 3 CLJ 338 HC ***(refd)***
Moran v. Lloyd's [1983] QB 542 ***(refd)***
Ong Guan Teck & Ors v. Hijjas Kasturi [1982] CLJ 31; [1982] CLJ (Rep) 616 HC ***(refd)***
Pembinaan LCL Sdn Bhd v. SK Styrofoam (M) Sdn Bhd [2007] 3 CLJ 185 CA ***(refd)***
Ranhill Bersekutu Sdn Bhd v. Safege Consulting Engineers & Anor [2004] 5 CLJ 343 HC ***(refd)***
Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd [2007] 3 SLR 86 ***(refd)***
Syarikat Pembinaan Binaken v. Perbadanan Pembangunan Bandar [2001] 3 CLJ 601 CA ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 21, 24(2)

For the plaintiff - Zamri Ibrahim (Mohd Hanif Abd Rahman with him); M/s Zamri Ibrahim & Co
For the defendant - Ong Kheng Leong; M/s Ghazi & Lim

Reported by S Barathi

JUDGMENT

S Nantha Balan JC:

Introduction

[1] This is an application by the plaintiff pursuant to s. 24(2) of the Arbitration Act 1952 to set aside the final award dated 14 November 2012 delivered by the learned arbitrator Mr Chong Thaw Sing ("the substitute arbitrator") on the grounds that the substitute arbitrator was biased and had committed misconduct in the course of the arbitration proceedings in respect of assessment of damages. Section 24(2) of the Arbitration Act 1952 states as follows:

> 24(2) Where an Arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

[2] The issues that lie at the heart of this application are whether in a truncated (or bifurcated) arbitration where it was agreed that liability and quantum of damages were to be dealt with separately, the principle of *res judicata* applies to a determination by the arbitrator as to the physical level or percentage of progress of works in the first stage or liability stage of the arbitration and if so, whether that in and of itself obviates or dispenses with need for the claimant to prove damages in the subsequent stage of the proceedings.

[3] Basically, there was a dispute between the plaintiff who was the defendant's main contractor arising out of the notice of termination issued by the defendant and the same was eventually referred to an arbitrator. The arbitration proceedings were bifurcated by consent, wherein the arbitrator had to decide a threshold issue as to the validity of the notice of termination issued by the defendant. The parties did not confer any jurisdiction on the arbitrator to determine the quantum of damages in the first stage (or liability stage). As such, in the first stage, the arbitrator only determined the validity of the termination notice.

[4] In this regard, the arbitrator *inter alia* held that the termination notice was invalid and this finding was in turn predicated on the plaintiff having achieved 93.43% physical progress of work. The plaintiff latched onto this finding and took the position that 93.43% physical progress of work was *res judicata* and that there was no necessity to adduce evidence of loss and damages at the assessment of damages stage in respect of value of work done.

[5] According to the plaintiff, the determination by the arbitrator at the liability stage that progress of work was 93.43% was a "done deal" and therefore there was nothing to prove at the next stage and that the arbitrator merely had to do the arithmetic and award the plaintiff the amounts due under the contract based on 93.43% of contract value less whatever sums that had already been paid by the defendant.

[6] Whilst accepting that the determination of progress of works was 93.43%, the arbitrator who heard the second stage of the arbitration held that the plaintiff nevertheless had the burden of proving damages.

[7] This case therefore pivots on the conduct of the substitute arbitrator who ruled that notwithstanding the original arbitrator's ruling by way of the interim award that the plaintiff had achieved 93.43% progress of work, the plaintiff nevertheless had to prove damages at the assessment of damages stage of the arbitration.

Bifurcated Arbitration

[8] As mentioned earlier, this was a two staged or bifurcated arbitration, that is, where the arbitrator dealt initially with liability ("Stage One") and thereafter with assessment of damages ("Stage Two"). The learned arbitrator who heard the arbitration at Stage One was Tuan Mohd Amin Firdaus bin Abdullah ("the original arbitrator"). The original arbitrator was not able to continue hearing the arbitration at the assessment of damages stage as he had by then been appointed as chairman of the Industrial Court. The original arbitrator later became a Judicial Commissioner of the High Court and retired in that post sometime in late 2013.

[9] The original arbitrator delivered an interim award dated 24 July 2006 with regards to the issue of the validity of the defendant's notice of determination dated 10 March 2003. Thereafter, Mr Chong Thaw Sing ("the substitute arbitrator") took over and continued with the arbitration during Stage Two. Stage Two of the arbitration was tumultuous. Disputes arose over the substitute arbitrator's rulings and the path that the arbitration or the assessment of damages was taking. During Stage Two of the arbitration, the plaintiff applied to the High Court to have the substitute arbitrator removed, but was unsuccessful. The plaintiff then continued with the arbitration which was presided over by the substitute arbitrator. Eventually the substitute arbitrator delivered the final award, which is now the subject of challenge in the present application before me.

Brief Background

[10] The plaintiff was appointed by the defendant as a main contractor to build houses. The contract which governed the relationship between the plaintiff and the defendant is dated 22 February 2001 and is the Standard Form JKR 203 Contract (Revised 10/83). Disputes arose between the plaintiff and the defendant which culminated in the defendant issuing a notice of determination dated 10 March 2003. The plaintiff commenced arbitration proceedings to declare the notice of determination as invalid and for consequential reliefs. The defendant filed a

counterclaim. By an order of the High Court in Originating Summons No. 24-760-2003, the original arbitrator was appointed as the arbitrator.

[11] By consent of the parties the proceedings were bifurcated and in Stage One the original arbitrator was asked to determine the following preliminary issues, that is, "whether there was in existence a supplementary agreement concluded on 5 February 2003 and if so, whether the notice of determination of the contract dated 10 March 2003 was lawful?"

[12] Next came the assessment of damages stage of the proceedings (Stage Two). It is important and imperative to note that during Stage One, the original arbitrator was not asked by the parties to deal with or determine any issue with regards to the quantum of damages or the monetary value of the work that was done by the plaintiff as the main contractor. In fact, the original arbitrator's terms of reference (or his jurisdiction) as agreed upon or conferred by the parties on the first day of the arbitration on 28 July 2004 was only to deal with and determine the two issues mentioned above.

[13] However, on 25 February 2005 the defendant changed tack and informed the original arbitrator that they wanted a final award rather than an interim award and made a request for the original arbitrator to deal with and determine the issue of quantum as well.

[14] However, the request by the defendant was strongly opposed and objected to by the plaintiff. And so acting completely in accordance with "party autonomy", the original arbitrator confined himself to his terms of reference and dealt only with the two issues mentioned above and did not deal with the issue of quantum or monetary value of the work done by the plaintiff.

[15] Hence, although the defendant wanted to include the issue of quantum in Stage One of the arbitration, it was the plaintiff who chose to defer it to the next stage of the proceedings. That was the plaintiff's choice at that time. And so, it was clear from the outset that quantum was to be dealt with later and not in Stage One. But that was not the position when it came to Stage Two. During Stage Two the plaintiff's position was that because of the original arbitrator's ruling on 93.43% of progress work, the issue of quantum was implicitly determined or settled or was a "done deal".

[16] By the interim award the original arbitrator found that the supplemental or supplementary agreement did exist and further held that the notice of determination dated 10 March 2003 was bad in law and amounted to a repudiatory breach of contract. In arriving at his decision the original arbitrator had observed that .... "at the end of the day the point to note is that the claimant had not achieved a progress rate of say, 70%, or even 80% which might have merited the termination of the contract but a rate of over 90% almost finishing the whole project. Therefore, it was unconscionable for the respondent to have terminated the contract in such a manner. It follows therefore that the termination of the contract by the respondent on 10 March 2003 was invalid and unlawful".

[17] Thus, it was implicit from the ruling by the original arbitrator in the interim award that the plaintiff had established that progress of works as at the date of termination of the contract was 93.43%.

[18] To complete the narrative *vis-à-vis* Stage One, I should add that the defendant applied to the High Court by way of Penang High Court Usul Pemula No. 25-61-2006 to set aside the interim award. The application was dismissed on 7 March 2007. The defendant appealed to the Court of Appeal by way of Court of Appeal Civil Appeal No. P-02-299-2007 and the appeal was dismissed on 30 June 2010. The matter went no further. Thus the interim award was immune from any further legal challenge. But, it is important to emphasise that the original arbitrator's finding that progress of work was 93.43% at the time of termination of the contract was one of the issues ventilated in the High Court and in the Court of Appeal. In the circumstances, the plaintiff maintained that the issue of 93.43% progress of works could not be re-opened as it was *res judicata*.

Stage Two Before The Substitute Arbitrator

[19] During Stage Two (assessment of damages) before the substitute arbitrator, disputes arose over the interpretation of the ruling or findings made in the interim award. The plaintiff contended that they were not obliged to prove any damages as they had already established that progress of works was 93.43% and so it was purely a matter of mathematical calculation. The defendant contended that the plaintiff had to still prove their damages and maintained that progress of works does not equate to value of works and that the latter had to be strictly proven.

[20] Essentially the defendant contended that the interim award only dealt with the lawfulness of the termination of contract whereas the issue of quantum flowing from the unlawful termination was a live issue in Stage Two of the proceedings before the substitute arbitrator. The plaintiff's position was that quantum was implicitly determined during Stage One by the original arbitrator and that in Stage Two the defendant should not be allowed to adduce evidence so as to expressly or impliedly re-open the percentage of progress of works.

[21] The substitute arbitrator gave two rulings dated 27 April 2011 and 19 May 2011 during the course of the proceedings which leaned in favour of the defendant's interpretation of the burden which still remained on the shoulders of the plaintiff. Essentially the substitute arbitrator ruled that the original arbitrator had not (and indeed could not have) made a ruling on quantum and that the issue of quantum was at large and extant in Stage Two of the arbitration proceedings.

[22] In this context, it is not without significance that during Stage One before the original arbitrator, the plaintiff had objected to the issue of quantum being conflated with the liability issue and it was the plaintiff's stand at that time that the two should be kept separate. And so, the substitute arbitrator found it rather contradictory for the plaintiff to assert in Stage Two that quantum had been determined in Stage One because of the issue of 93.43% progress of works.

[23] As I said, the proceedings before the substitute arbitrator were tumultuous. In particular, the plaintiff was not happy that the defendant's cross-examination of the plaintiff's witnesses and reliance upon their detailed measurement report, marked as exh. "RB3" amounted to a re-opening of the progress of works level of 93.43%. According to the plaintiff, the substitute arbitrator was conducting Stage Two in such a manner as would violate the principle of *res judicata vis-à-vis* the level of progress of works of 93.43%. The dispute between the plaintiff and defendant during Stage Two necessitated the handing down of two interim rulings dated 27 April 2011 and 19 May 2011 by the substitute arbitrator.

[24] The following extracts from the substitute arbitrator's interim rulings are relevant for consideration in the context of the present challenge to the final award. In his ruling dated 27 April 2011, the substitute arbitrator said:

Be that as it may, the tribunal has decided that the issue of progress of work is a closed issue but the proof of quantum of damages is not. The parties have agreed by adopting the bifurcated proceeding, the procedure that the tribunal shall first determine the issue of liability and leaves the assessment of the damages to a later stage either by the same or different arbitrator. This is the stage we are now in, except that it is before a different arbitrator for a known reason.

As such, the progress of work aside, the Claimant continues to bear this burden to prove that, according to law, they are entitled to be paid for the losses they have suffered due to the infraction of its rights. Whilst, I disagree that the SO's final certificate binds this tribunal, the Respondent is entitled to adduce the evidence to prove the quantum of damages the Claimant is entitled to. Clause 51(c)(v) which says the SO's final certificate binds the contractor does not bind this arbitral tribunal because Clause 54(e) empowers the arbitral tribunal "to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters submitted to him ...". *Equally, the Claimant continues to bear the burden to prove that the 93.43% supports their prayer for the under certified sum as no judicial notice has been taken to equate progress of work equals entitlement of payment. In this regard, nothing pertaining to assessment of quantum is final and binding on this tribunal.*

Conclusion

Now having perused and considered the submissions proffered by both parties, I declare that *the issue of progress of work at termination of 94.34% shall not be re-opened by the Respondent in this proceeding.*

And the claimant must still discharge the burden to prove that they are entitled to receive the remedies sought. The Respondent is also allowed to adduce evidence to rebut the Claimant's contention. (see pp. 2 – 8 of exh. ABS8 vol. 3 of encl. 9). (emphasis added)

[25] Then, in his amplification of ruling dated 19 May 2011, he said:

The gist of the tribunal's ruling was that the progress of work determined or accepted by the previous arbitrator at 93.43% shall not be re-opened in this continuation of the arbitral proceeding. This is premised on the fact that the previous arbitrator had in arriving at its decision, which disposed of two preliminary issues ie, "(1) Whether there is in existence a Supplemental/Supplementary Oral Agreement arising out of the Special Meeting on the 5th February 2003 between both parties and (2) Whether the Respondent was entitled to determine the Contract and whether the termination of the Contract was lawful on the 10th of March

2003 was lawful", relied on the Claimant's having achieved a progress of work at 93.43%. If the Respondent is allowed to adduce new evidence that the progress of work is less than 93.43%, the subsequent decision based on new evidence would tantamount to reversing the decision of the previous arbitrator which I am not allow to do in law. But what the interim award did not define is that the 'progress of work' amounts to the work done under the contract. The Claimant said the progress of work of 93.43% relates to the contract sum of RM11,554,506.80 whilst the Respondent denied that that is a correct computation because the figures to be used to compute the contract sum ought to exclude RM400,000.00 being an unexpended provisional sum, defective works and other set-offs. *The Claimant has not adduced any compelling evidence that showed the 93.43% in progress of work amounts to 93.43% of its entitlement for the work done under the contract. Whilst not wanting to prejudge the merit of this issue at this juncture, the Claimant nevertheless has a duty in law to adduce evidence to show this tribunal, tasked with assessing the quantum damages as to its claim. The Claimant's insistence that the previous Arbitrator had already determined the quantum of work done is inconsistent with the parties' agreement.*

According to the Claimant, the previous arbitrator had directly or indirectly determined the issue of quantum of damages they are entitled to receive. The Claimant argued that because this issue of quantum of work done had been adjudicated by the previous arbitrator it is a closed issue according to *Asia Commercial Finance Sdn Bhd v. Kawal Teliti Sdn Bhd*'s, ie, the principle of *res judicata* has set in and the Respondent cannot now re-open the issue of quantum of work done. As such the Respondent shall not be allowed to bring any evidence which will directly or indirectly reduce the work done from the percentage of work done from 93.43% to any lower value. This includes evidence for counterclaim from defective work, reconstruction of lots 105 and 106 and direct payment to Kasu Mega Electrical Engineering. In short, the Claimant argued that the previous arbitrator had determined the liabilities of the various issues pleaded in the Statement of Claim and the Statement of Defence and Counterclaim including liability for defective works etc. As a consequence, this tribunal's role is purely to mathematically compute the quantum of loss based on the previous arbitrator's decision on the preliminary issues. The Claimant is of the view that "with the determination of progress of work by the Claimant of 93.43%, the amount short paid and still owing by the Respondent will then be established. Thus, the amount short paid and still owing for work done by the Claimant will be the amount of progress of work less payment actually received (93.43% of the Contract amount less payment actually received by the Claimant). Nothing less than that".

With due respect, I find the Claimant's contention incongruent with the parties' original agreement to determine the two preliminary issues ahead of the assessment of the quantum of damages. If the Claimant's assertion is true that the previous arbitrator's interim award had directly or indirectly determined the issues related to quantum of damages, then the interim award would have exceeded the remit of the parties to the tribunal at the commencement of the proceeding in 2004 to separate the damages. This is a conundrum facing this tribunal which is required in law to finally decide on all other pleaded issue other than the preliminary issue, already determined in the interim award, and publish a final award. The Claimant's contention now is inconsistent with its earlier refusal to accede to the Respondent's request, mid-way during the proceeding, to have a combined liability and quantum hearing instead of spilt proceeding.

I find the Claimant cannot reasonably argue that the issue of quantum of loss including the counterclaim are issues or fact so clearly formed part of the 1st stage of the proceeding and should have been raised but did not raise. In the circumstances, *res judicata should not operate to prevent the raising of pleaded issues necessary for a proper assessment of the final quantum of damages*. To decide as averred by the Claimant would tantamount to the acceptance that the 1st stage of the proceeding had determined all issues including the liability of the Claimant for defective work, set-offs etc. Having said that I am of the view the previous learned arbitrator did rely on the state of physical progress of work to arrive at the decision in interim award, hence the progress of work of 93.43% at termination should not be re-opened. To allow the progress of work to be reduced to lower percentage than 93.43% would indirectly reverse the decision of the previous arbitrator. In the award the previous learned arbitrator said termination might have merit had the percentage of progress of work was 70% or even 80%.

My order to the Claimant that they still bear the burden to prove loss is not inconsistent with the law applicable to the assessment of quantum of damages. The Claimant averred their claim is debt owing, hence proof is not required. Short of an admission, even a debt which is contested need to be proved. In the circumstances, I reaffirmed my ruling.

For avoidance of doubt, I confirm my ruling:

a. The progress of work of 93.43% is a closed issue in view of the interim award;

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b. *The Claimant must still bring evidence to persuade this tribunal that the 93.43% progress of work equals the amount they have pleaded in the Statement of Claim*; and

c. The Respondent's counterclaim remains a live issue which they bear the burden to prove. (emphasis added)

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[26] In any case, the plaintiff was unhappy with the rulings and challenged those rulings by way of Notice of Motion No. 25-60-2011 and sought to have the substitute arbitrator removed for misconduct and bias but the High Court dismissed the plaintiff's C application on 30 November 2011. And the plaintiff did not appeal against that decision. Instead the plaintiff went back to the arbitration proceedings, under protest, in order to continue and complete the arbitration before the substitute arbitrator.

D **[27]** By his rulings dated 27 April 2011 and 19 May 2011 the substitute arbitrator had opined that parties had to discharge their burden of proving or disproving the damages or the monetary claim that was being made by the plaintiff. Since the plaintiff had failed in their attempt at removing the substitute arbitrator based on bias and misconduct, it follows that the rulings were essentially E carried into effect when the arbitration continued before the substitute arbitrator.

[28] Ultimately, the substitute arbitrator ruled that the plaintiff had not adduced any compelling evidence that showed that F 93.43% in progress of works amounts to 93.43% of its entitlement for the work done under the contract. Based on the evidence that was adduced in Stage Two the substitute arbitrator concluded that the value of work done was only 80.12% of contract value. In my view, the plaintiff's unsuccessful challenge to the substitute G arbitrator's rulings by way of Notice of Motion No. 25-60-2011 is very material and significant to the validity of the procedural and substantive aspects of the present challenge to the final award. The significance of this is discussed in the later part of this judgment.

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Setting Aside An Award Under s. 24 Of The Arbitration Act 1952: The Guiding Principles

[29] Since this is an application under s. 24 of the Arbitration I Act 1952, it would be necessary to set out or identify the principles which are applicable when there is a challenge to an arbitration award. The principles may be culled from the following cases.

[30] In *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743, Siti Norma Yaakob, FCJ emphasised the conclusive nature of an arbitrator's award. This is how she put it:

> An Arbitrator's award is final, binding and conclusive, and may only be challenged in exceptional circumstances. Hence, the fact that an arbitrator has erred in drawing the wrong inferences of fact from the oral or documentary evidence is not in itself a sufficient reason to warrant his award being set aside. It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence has been misapprehended and misunderstood. The power to set aside an award under Section 24 (2) of the Act is only exercisable where the arbitrator has misconducted himself or where the award has been improperly procured. A failure to analyze and appraise the evidence does not vitiate the award on the ground of misconduct.

[31] The only ground to set aside an award is an error of law on the face of the award. See: *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1; [2006] 1 MLJ 710.

[32] Unlike an appeal where an erroneous finding of fact may be reversed, an arbitrator's finding of fact is conclusive and is not open to challenge. Hence, the court's only role is limited to determine whether there is an error on the face of the award and not to re-hear the matter or to treat it as an appeal. See: *Syarikat Pembinaan Binaken v. Perbadanan Pembangunan Bandar* [2001] 3 CLJ 601 at p. 604; [2001] 2 AMR 2145 at p. 2149.

[33] It is not the court's role to re-hear the matter or to re-evaluate the finding of facts. See: *AC Ho Sdn Bhd v. Ng Kee Seng* [1998] 2 CLJ 645.

[34] In *Lian Hup Manufacturing Co Sdn Bhd v. Unitata Bhd* [1994] 3 CLJ 338; [1994] 2 MLJ 51 the court enunciated that "The court must not be over ready to set aside awards unless there is something radically wrong and vicious in the proceedings".

[35] Next, reference should be made to *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788; [1999] 2 MLJ 481 where the limited jurisdiction of the court was explained by Gopal Sri Ram, JCA as follows:

> In my judgment, the jurisdiction to set aside or to remit an arbitrator's award whether at common law or under statute is one that should be exercised with great care and with a proper sense

of responsibility. One may do well to keep in mind the words of Sharma J in *Puri Construction Pvt Ltd v. Union of India* AIR 1989 SC 777 at p 780:

> when a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Arbitration Act and it has no jurisdiction to sit in appeal and examine the correctness of the award on merits.

[36] Later in *Pembinaan LCL Sdn Bhd v. SK Styrofoam (M) Sdn Bhd* [2007] 3 CLJ 185; [2007] 4 MLJ 113 Gopal Sri Ram JCA (as he then was) reformulated the same principle and stated as follows:

> It is the unanimous view of all the authorities that the High Court in exercising its statutory jurisdiction under the Arbitration Act 1952 does not enjoy appellate jurisdiction. See, for example *Puri Construction Pvt Ltd v. Union of India* AIR 1989 SC 777 where it was held that; a court while examining the objections taken to an award filed by an arbitrator is not required to examine the correctness of the claim on merits. The court cannot sit in appeal over the views of the arbitrator by re-examining and reassessing the materials.

[37] Another aspect of the principle of non-interference is that the High Court should adopt a "hands-off" approach to matters falling within the jurisdiction of the arbitrator. In this regard, it would be relevant to quote from the judgment of Raus J (as he then was) in *Ranhill Bersekutu Sdn Bhd v. Safege Consulting Engineers & Anor* [2004] 5 CLJ 343 where he said:

> The High Court's jurisdiction under section 24 (2) of the Act for setting aside an arbitrator's award for misconduct is very limited and only to be exercised sparingly ... It is well settled that the court's general approach to arbitrations is a hands-off attitude unless there has been something radically wrong and vicious in the proceeding.

The Orders Sought In This Application

[38] The orders sought by the plaintiff in this application are that the following decisions of the substitute arbitrator be set aside:

(i) The decision which has varied the stage of work done by the plaintiff as decided by the original arbitrator and thereafter confirmed by the High Court of Penang and the Court of Appeal from 93.43% to 80.12%, be set aside and maintained at the original stage of 93.43%;

(ii) The decision that the total amount of the balance payment for the progress work carried out by the plaintiff at RM313,052.90 be set aside and substituted by the actual amount of RM1,741,060.23;

(iii) The decision that the pre-award interest at the rate of 5% per annum according to the Rules of Court 2012 on the said balance payment for the progress work done by the plaintiff of RM313,052.90 calculated from the date of the termination of the contract until its full settlement be set aside and substituted by the industrial rate of 1.5% per mensem or alternatively at the rate of 8% per annum according to the Rules of the High Court 1980, on the actual amount of RM1,741,060.23;

(iv) The decision that the amount of the plaintiff's loss of profit at RM456,322.63 (calculated based on 19.88% from the profit amount) be set aside and substituted with the actual amount of RM2,310,901.36 (20% on the contract value of RM11,554,506.80);

(v) The decision that the pre-award interest on the amount of the plaintiff's loss of profit of RM456,322.63, at the rate of 5% per annum according to the Rules of Court 2012 calculated from the date of the termination of the contract until its full settlement, be set aside and substituted with the industrial rate of 1.5% per mensem or alternatively at the rate of 8% per annum according to the Rules of the High Court 1980 on the plaintiff's actual loss of profit amount of RM2,310,910.36;

(vi) The decision dismissing the plaintiff's claim of pre-award interest based on the interest charged by suppliers and the sub-contractors against the plaintiff in the amount of RM1,682,270.30 as of June 2010 be set aside and substituted with an order allowing the said claim;

(vii) The decision dismissing the plaintiff's claims for punitive and exemplary damages of RM2,000,000 and damages for loss of reputation of RM2,000,000 as a result of the breach of contract by the defendant be set aside and substituted with an order allowing the said claims;

(viii) The costs of reference of the said arbitration which was not decided by the substitute arbitrator is to be awarded by this Honourable Court in the amount of RM218,765.88.

(ix) Such other reliefs as this Honourable Court shall deem reasonable and fit.

The Plaintiff's Grounds In Support Of This Application

[39] The plaintiff cast the net wide and made a plethora of complaints in order to challenge the final award. But the principal complaint made by the plaintiff in the present application pertains to the alleged refusal by the substitute arbitrator to adhere to the decision by the original arbitrator who had decided that the stage of work done by the plaintiff was 93.43% and his further act in relying on exh. RB3 to conclude that the monetary value of work done is 80.12% of contract value.

[40] Next, it is alleged that the substitute arbitrator had misconducted himself and was biased when he held that the defendant's detailed measurement report or exh. RB3 was admissible as evidence to prove that value of work done was 80.12% despite the absence of its maker who was not called to verify and testify as to its truthfulness. According to the plaintiff, this was contrary to the established principle under the law that requires the maker to be present to confirm its authenticity and give an opportunity for the plaintiff to cross-examine him.

[41] The plaintiff also alleges that the substitute arbitrator misconducted himself and was biased when he accepted the evidence of RW1 and RW2 to prove that the level of work done was 80.12% whereas RW1 and RW2 were not involved in the final valuation process or in the preparation of exh. RB3.

[42] The plaintiff also complains that the substitute arbitrator misconducted himself and was biased when he allowed the defendant's counterclaim for an amount of RM38,700 allegedly being a direct payment made by the defendant to Kasu Mega Electrical & Engineering without any evidence and despite the fact that this was never pleaded and the counterclaim had been rejected previously by the original arbitrator.

[43] The rest of the plaintiff's complaints which were relied upon to impugn the final award are consequential to or hinged on the substitute arbitrator's finding that the value of work done was 80.12%.

[44] Also the plaintiff is unhappy that their claim for interest at the rate 1.5% per mensem was disallowed. In this regard, the plaintiff also argued that the substitute arbitrator had committed an error of law in disallowing interest charged by the plaintiff's sub-contractors, claim for loss of reputation and exemplary and punitive damages.

[45] Interestingly, the plaintiff maintains that the decisions made by the substitute arbitrator in his final award are unmaintainable as the plaintiff had previously applied to the High Court of Penang to revoke his authority and remove him and to substitute him with another arbitrator due to his misconduct and bias in respect of the directions and rulings given by him particularly on the issue of 93.43% work done by the plaintiff which application was dismissed by the High Court. As such, the plaintiff says that it is impossible for the substitute arbitrator to act fairly and justly in presiding over Stage Two of the arbitration proceeding.

[46] It is obvious enough that the substitute arbitrator's rulings dated 27 April 2011 and 19 May 2011 are causally connected to the final award in that the final award is the end product of the interim rulings which had been unsuccessfully challenged in Notice of Motion No. 25-60-2011. It would not be wrong to say that by Notice of Motion No. 25-60- 2011 the plaintiff had essentially challenged the substitute arbitrator's handling (or mishandling) of Stage Two of the arbitration. However, it cannot be gainsaid that the learned judge of the High Court who heard Notice of Motion 25-60-2011 was not satisfied that there was any bias or misconduct on the part of the substitute arbitrator.

[47] At the very least it may be safely assumed that the learned judge did not think that there was any merit in the complaints made by the plaintiff. And rather significantly it may be noted that the plaintiff decided not to challenge the correctness of the High Court's decision to dismiss Notice of Motion No. 25-60-2011.

[48] In this regard, counsel for the plaintiff said that they did not take the matter up as the arbitration had already been delayed for too long and they wanted to get on with it. But that is only a practical answer and not a legal one. Legally, the failure to challenge the dismissal of Notice of Motion No. 25-60-2011 would mean that the plaintiff has expressly or implicitly accepted the correctness of that decision. That in itself was sufficient to render the two rulings as *res judicata* for purposes of Stage Two of the arbitration.

[49] As such, it was argued for the defendant that it was not open to the plaintiff to ventilate by way of the present challenge to the final award, issues which had already been taken up and disposed of in previous legal proceedings, particularly the interim rulings made by the substitute arbitrator.

[50] In so far as the issue of damages is concerned, it is clear that it was not (and could not have been) dealt with by the original arbitrator as it was not within his jurisdiction to do so. As such, it was argued by the defendant that damages were at large and remained extant in Stage Two of the arbitration proceedings in respect of which both sides were given every opportunity of proving or disproving the quantum that was being claimed by the plaintiff. Hence, for the plaintiff to say that the damages claimed was a "done deal" purely because of the original arbitrator's ruling in the interim award that the plaintiff had (implicitly) established that progress of works was 93.43% is contrary to the agreement of the parties *vis-a-vis* the jurisdiction or terms of reference conferred on the original arbitrator in Stage One.

Res Judicata

[51] In this regard, the plaintiff contended that the findings and decision of the original arbitrator pertaining to 93.43% progress of work which was upheld and affirmed by the High Court and the Court of Appeal ought not to be revisited at Stage Two by the substitute arbitrator as that would be contrary to the principle of *res judicata*. In this regard reference was made to *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 at p. 791; [1995] 3 MLJ 189 at p. 197, where it was said:

> When a matter between two parties has been adjudicated by a Court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata* ...

[52] Then at p. 793 (CLJ); at pp. 199 and 200 (MLJ) the following quotation was referred to:

> On the other hand, the issue estoppel literally means simply an issue which a party is stopped from raising in a subsequent proceeding. However, the issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more ie, that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to

the controversies alluded to above; the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision.

[53] The substitute arbitrator's response to the plea of *res judicata* was dealt with in the final award. In this regard, he asked himself whether the plaintiff was entitled *per se* to the contractual value of 93.43% based on the physical progress of work. His analysis on this point was articulated as follows:

> 43. The parties' agreement specifically wanted the previous arbitrator to deal with only two preliminary issues pertaining to liability only. The decision of the learned arbitrator in the 1st stage determination were published in an interim award before the 2nd stage proceeding commenced. This Claimant submits that the then arbitrator, while making the decision on the liability issues had considered and rejected the Respondent's arguments that the actual final total value of work properly done by the Claimant at termination was only about 80% not 93.43%. Claimant argued that by accepting the Claimant's contention of physical progress of work at termination of 93.43%, the arbitrator had considered and rejected the Respondent's value of work argument. Therefore, to the Claimant, the final total value of work done is a 'done deal' and cannot be anything less than 93.43% of the Contract sum despite the agreement by the parties to have separate determinations of liability and damages.
>
> 48. The 1st tribunal in arriving at the decision relied on the level of progress of physical work at termination. The information on the *final value of work done properly belongs in this proceeding not in the 1st stage proceeding as it was not the competent tribunal to consider this information*. In the circumstances, it is perfectly within the power of this tribunal to direct the Claimant to adduce evidence to prove that 93.43% physical progress of work could be translated *into what it sought in the pleading* i.e. RM1,573,034.22 or the amended value of RM1,741,060.23. (emphasis added)

[54] In my view, all issues relating to how damages are to be assessed and what evidence is required to prove the damages that are being claimed are within the jurisdiction of the substitute arbitrator to decide and following the principles adverted to earlier in this judgment, the High Court should not interfere with the substitute arbitrator's assessment of or appraisal of or even the reception (admissibility) of the evidence that is adduced or relied upon in the arbitration before him.

[55] The principle in this regard may also be culled from the case of *Lau Tiong IK Construction Sdn Bhd v. The Government Of Malaysia* [2007] 1 LNS 420; [2008] 5 MLJ 604 which states that the arbitrator is the sole judge in respect of the reception of evidence and the quality as well as quantity of evidence. In this regard reference may be made to the following passage of that case where it was held as follows:

> The arbitrator is the sole judge of the quality as well as quantity of evidence, and it was not open for the court to take upon itself the task of being a judge of the evidence before the arbitrator. An award cannot be remitted when the error complained of was committed in the exercise of the arbitrator's jurisdiction.

[56] As for the burden of proof, the position is trite and clearly encapsulated in the judgment of the then Court of Appeal in *John v. Dharmaratnam* [1961] 1 LNS 35; [1962] MLJ 187 where it was held that the burden of proof in respect of damages was always on the plaintiff to prove the amount of damages suffered. The principle was stated as follows:

> My attention has been drawn to a passage from the judgment of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd* which to me appears to be very apt in the circumstances of the present case where the Learned Lord Chief Justice said:
>
> > On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: This is what I have lost; I ask you to give me these damages. They have to prove it.

[57] But in the present case, the plaintiff was adamant and chose to stick to their arithmetical approach instead of proving empirically that the progress of works of 93.43% was equal to or at par with the value of the works that was being claimed. On hindsight, this problem or situation would not have arisen had the plaintiff acceded to the defendant's request during Stage One to include the issue of quantum for determination by the original arbitrator. But the plaintiff chose to confine the original arbitrator's terms of reference to the existence of a supplementary agreement and the lawfulness of the notice of determination.

[58] In my view, even though the original arbitrator had ruled by way his interim award dated 24 July 2006 that progress of works was 93.43%, the burden was still on the plaintiff to prove on a balance of probabilities that they have suffered loss due to the wrongful termination of the contract by the defendant and that the loss was equivalent in value to 93.43% of the contract value minus the amounts already paid by the defendant.

[59] In this regard it is apposite to note that cl. 51(c)(v) of the contract prescribes the requirement for the superintending officer ("SO") to assess the final costs due to either party following the termination of the contract and that the clause empowers the SO to issue a final certificate after the final costs to complete the remaining work post termination are known. The said clause applies regardless of the validity of the termination. Thus the final certificate was a matter which the substitute arbitrator was obliged to take into account in the final analysis and determination of the amounts that the plaintiff was entitled to as a result of wrongful termination of contract by the defendant.

[60] Also cl. 54(e) of the contract empowers the substitute arbitrator "to review and revise any certificate, opinion, decision, requisition or notice and to determine all matters submitted to him ...". In as much as it was within the jurisdiction of the substitute arbitrator to accept or to reject evidence, it was also within his jurisdiction to decide not just on the quantum payable by the defendant but also on the appropriate rate of interest that was to be awarded to the successful party which is a matter of discretion which most certainly cannot amount to an error of law.

The Final Award

[61] The main issue in respect of Stage Two of the arbitration was as follows: "Whether the claimant is entitled to recover RM1,741,060.23 for the alleged under certification by the respondent? If no, what is the value of work the claimant is entitled for?"

[62] The substitute arbitrator had considered this issue at paras. 39 to 55 of the final award and in particular whether the plaintiff was entitled *per se* to the contractual value of 93.43% based on the physical progress of work. This is what the substitute arbitrator said in the final award:

> 43. The parties' agreement specifically wanted the previous arbitrator to deal with only two preliminary issues pertaining to liability only. The decision of the learned arbitrator in the 1st stage determination was published in an interim award before the 2nd stage proceeding commenced. This Claimant submits that the then arbitrator, while making the decision on the liability issues had considered and rejected the Respondent's arguments that the actual final total value of work properly done by the Claimant at termination was only about 80% not 93.43%. Claimant argued that by accepting the Claimant's contention of physical progress of work at termination of 93.43%, the arbitrator had considered and rejected the Respondent's value of work argument. Therefore, to the Claimant, the final total value of work done is a 'done deal' and cannot be anything less than 93.43% of the Contract sum despite the agreement by the parties to have separate determinations of liability and damages.

[63] It was submitted for the defendant that this was essentially an issue of quantum arising under the plaintiff's claim that there was under-certification by the defendant's architect and a live issue for the substitute arbitrator to decide as to the quantum that was due and payable by the defendant to the plaintiff on account of the alleged under-certification. Hence, the issue was well within the purview of the substitute arbitrator to decide what was the actual quantum due to the plaintiff for works completed contractually under the contract, taking into account all matters contractually needed to be considered for defective works, set-off, works not done according to contractual specifications, works or items done by plaintiff subsequently rejected by architect due to non-compliance with specifications or contract, payments to the plaintiff's sub-contractors made by defendant, omissions by plaintiff, works completed by plaintiff but not in compliance with contract and subsequently rejected, variation orders, etc, at the point of termination. This was considered fully by the substitute arbitrator and this is to be seen in para. 48 the final award where he states as follows:

> The 1st tribunal in arriving at the decision relied on the level of progress of physical work at termination. The information on the final value of work done properly belongs in this proceeding not in the 1st stage proceeding as it was not the competent tribunal to consider this information. In the circumstances, it is perfectly within the power of this tribunal to direct the Claimant to adduce

evidence to prove that 93.43% physical progress of work could be translated into what it sought in the pleading ie, RM1,573,034.22 or the amended value of RM1,741,060-23.

[64] Ultimately, the substitute arbitrator made a finding of fact in para. 49 of his final award that the plaintiff failed to adduce any evidence in the proceedings to prove that reported physical progress of work of 93.43% was equal to 93.43% of the total value of work properly done in accordance with the contract taking into account defective works, works not done to specifications, defective works not completed, material on site and other matters as assessed under the contract. In this regard, he made the following conclusion:

The Claimant's reluctance to offer evidence in this proceeding to prove that 93.43% physical progress of work equals 93.43% of the value of work properly done has resulted in its failure to carry its burden. In comparison, the Respondent has produced a comprehensive report which detailed the Respondent's consultants' measurement of the value of work done at termination. This report by RB3 showed that, despite the reported 93.43% progress of physical work, the actual value of work properly executed amounted to much less than 93.43% of the total contract value. (emphasis added)

[65] The substitute arbitrator also made a finding of fact in para. 54 of his final award that the plaintiff failed to adduce any evidence on this issue and that the only evidence available was the detailed measurement report by the project consultants (RB3) which was undertaken immediately on 12 March 2003 and 13 March 2003 after the date of termination of 10 March 2003. On the paucity of evidence on the plaintiff's part, he said:

Without persuasive evidence from the Claimant showing that the 93.43% physical progress of work is equivalent to the same value of work properly executed, I am compelled to rely on the detailed measurement records produced by the project consultants as a primary source of information to arrive at my decision on the issue.

[66] In so far as the interest charges from sub-contractors is concerned, the substitute arbitrator made a finding of fact in para. 78 of his final award that the plaintiff failed to discharge the burden to prove the loss they allegedly suffered. He said:

It is my humble view that the Claimant has failed to discharge the burden to prove the loss it has allegedly suffered. What witnesses CW3-CW16 had testified were interest charges the respective witnesses' companies had charged NDSB for the debts

A owed by NDSB. These charges have no nexus to the Claimant until either the Claimant has paid the amount or become liable for it when a suit has been filed by NDSB. We know as a matter of fact that none of the above events has taken place, therefore, it is fair and reasonable to conclude that the Claimant has not suffered the loss of RM1,682,270.30. In the circumstances, I dismiss the B Claimant's claim of RM1,682,270.30 as charges by NDSB's subcontractors, suppliers and bank.

[67] Then in so far as punitive and exemplary damages that were claimed, the substitute arbitrator concluded that the plaintiff failed C to discharge the burden of proof to be entitled to recover punitive and exemplary damages in accordance with the principle applicable pertaining to this head of claim. In para. 91 of his final award the substitute arbitrator explained why he was rejecting this head of claim:

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91. I therefore find that the Claimant has not discharged the burden to prove that the Respondent has acted oppressively, maliciously or arbitrarily in terminating the Claimant's contract. Neither has the Respondent profited from the termination.

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92. In the circumstances, I dismiss the Claimant's claim for exemplary and aggravated damages.

[68] On the complaint pertaining to the interest that was allowed by the substitute arbitrator, I need only refer to s. 21 of the F Arbitration Act 1952 which prescribes that the award of interest is at the discretion of the arbitrator and that interest will run from the date of the award at the same rate of the judgment debt. Section 21 states as follows:

G A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award at the same rate as a judgment debt.

[69] The rate of interest imposed was explained in para. 114 of the final award where the substitute arbitrator said:

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The Court of Appeal in *Leong Kum Whay* confirmed not only the arbitrator's power to award interest but has also limited the arbitrator's discretion to following established court practices under normal circumstances. The current court practice under Order 42 I rule 12 in the Rules of Court 2012 provides that every judgment debt to carry interest from the date of judgment at a maximum rate of 5% per annum (current rate set in Chief Justice's circular) unless higher rate has been agreed between the parties. In this

instance, I find no exceptional circumstance to persuade me to depart from the court's normal practice to award the maximum 5% per annum interest on the judgment sum awarded until the date of payment. In the circumstance, I direct the post award interest at 5% per annum simple interest to accrue 14 days from the date of this award until payment.

[70] When viewed as a whole and taking into account all the circumstances, it is my view that the substitute arbitrator did not commit any error of law, as he correctly held that the issue of progress of work of 93.43% which was determined by the original arbitrator was *res judicata* and cannot be re-opened or revisited but that in and of itself did not absolve the plaintiff of the burden of proving to the satisfaction of the substitute arbitrator the monetary value of the work that had been completed.

[71] It is in this respect that the plaintiff had failed to measure up in terms of the evidence that was adduced. The plaintiff could have but chose not to tender any tangible empirical evidence of their own to establish the monetary value of their claim or to satisfy the substitute arbitrator that 93.43% progress of works was equivalent to 93.42% of the contract value. And so the substitute arbitrator cannot be faulted for relying on the only tangible empirical evidence that was adduced by way of exh. RB3 which was the detailed measurement report tendered by the defendant.

[72] Ultimately, the only credible evidence available to the substitute arbitrator pertaining to quantum was exh. RB3 and the evidence of the architect of works, Ar Zuraimi bin Harun (RWS-1) and the quantity surveyor, Encik Shamshul Ariffin Abd Aziz (RWS-2) who had both confirmed that pursuant to cl. 51(c)(v) of the contract, the consultants had after the termination on the 10 March 2003 gone to the site 12 March 2003 and 13 March 2003 and also invited the plaintiff's representative to be present for purposes of assisting the superintending officer to assess the final cost due to either party following termination. This was to be done irrespective of the validity of the termination. The assessment of the final cost due is contained in the detailed measurement report "RB3".

[73] In the context of the plaintiff's complaint that the final award suffered from errors of law, the necessary question in these proceedings is whether during Stage Two of the arbitration, the substitute arbitrator mishandled the arbitration to the extent that it occasioned a miscarriage of justice? Having read the cause

papers and the submissions of the parties and having due regard to the relevant legal principles adverted to earlier, I was left in no doubt that there was no element of mishandling whatsoever by the substitute arbitrator. On the contrary his rulings were all well-reasoned and legally sound in that they were predicated on established legal principles. Indeed, throughout Stage Two, there was due compliance with the principles of natural justice and every opportunity was given to both sides to put their best case forward.

[74] The final award itself is a gleaming example of a well-written award. I would go on to add that the substitute arbitrator conducted himself very professionally and did not allow himself to become incensed with the language used in some of the letters that were written by the solicitors for the plaintiff.

[75] As I said, Stage Two of the arbitration was tumultuous. But that did not deter the substitute arbitrator from carrying out his task at hand with the utmost of professionalism and independence. Although the substitute arbitrator found himself in a hard position, he remained unbiased and gave every opportunity to the plaintiff to prove their claim. But the plaintiff stuck to their arithmetical approach instead of proving their losses.

[76] Hence, notwithstanding that the substitute arbitrator had directed the plaintiff to adduce evidence to prove that 93.43% physical progress of work could be translated into what it sought in the pleading ie, RM1,573,034.22 or the amended value of RM1,741,060.23, the plaintiff stood their ground and interpreted things differently and chose not to prove their claim for damages. For reasons that have been well articulated in the final award, the substitute arbitrator declined to accede to the views advanced by the plaintiff as to the extent to which the substitute arbitrator was bound by the ruling (or finding) made in the interim award as regards progress of works of 93.43%.

[77] In this application, the plaintiff says that the substitute arbitrator was biased and had committed misconduct. And so the relevant question is: what is misconduct for purposes of an application under s. 24 of the Arbitration Act 1952. In this regard, reference may be made to the following cases which touch upon the definition of misconduct.

[78] In *Moran v. Lloyd's* [1983] QB 542 it was established that "an arbitrator or umpire did not misconduct himself or the proceedings merely because he made an error of fact or of law, that it was doubtful whether inconsistency between one part of an award and another could constitute or evidence misconduct on the part of an arbitrator". A B

[79] The approach to be taken by the court in an application of this nature is that there must be an objective view that there has been mishandling of the arbitration leading to substantial miscarriage of justice and the making of an erroneous finding of law, of fact or procedural errors by itself do not amount to misconduct. This principle was established in *Anwar Siraj And Another v. Ting Kang Chung And Another* [2003] 2 SLR 287 where it was stated as follows: C D

> "Misconduct" was such a mishandling of the arbitration as was likely to amount to some substantial miscarriage of justice. It was a question of fact and degree and depended on the circumstances of the case. The making of an erroneous finding of law, of fact or procedural errors did not, by themselves, amount to misconduct. E

[80] In order for there to be a substantial miscarriage of justice, there has to be a failure to observe the rules of natural justice or an appearance of bias, partiality, illegality or dishonesty. In *Ranhill Bersekutu Sdn Bhd v. Safege Consulting Engineers & Anor* [2004] 5 CLJ 343 Raus Sharif (as he then was) opined at p. 344 that: F

> (2) ... The High Court's jurisdiction under Section 24(2) of the Act for setting aside an arbitrator's award for misconduct is very limited and only to be exercised sparingly, that is, as such in the event of a miscarriage of justice in which there is a failure to observe the rules of natural justice or an appearance of bias, partiality, illegality or dishonesty. None of these circumstances justified setting aside the two orders in this case. G
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> (5) It is well settled that the court's general approach to arbitrations is a "hands-off attitude unless there has been something radically wrong and vicious in the proceeding". The court will not review the arbitrator's discretion provided that he acts within his authority and according to the principles of justice. On the facts of this case and for the aforesaid reasons, the orders sought by the plaintiff could not be granted. H I

[81] It is clear therefore that the High Court has very limited powers and can only set aside the award if there has been a breach of natural justice leading to a substantial miscarriage of justice. Thus the general approach is one of minimal or no curial interference. The decision of the Singaporean Court of Appeal in *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] 3 SLR 86 is instructive as it had distilled the following principles pertaining to curial interference:

> (5) A survey of case law and principles led to the formulation of the following core principles. First, parties to arbitration had, in general, a right to be heard effectively on every issue that might be relevant to the resolution of a dispute. The overriding concern was fairness. Second, fairness, however, was a multidimensional concept and it would also be unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising multitude of arid technical challenges after an arbitral award had been made. The courts were not a stage where a dissatisfied party could have a second bite of the cherry. Third, the latter conception of fairness justified a policy of minimal curial intervention, which had become common as a matter of international practice. Fourth, the delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice were complied with in the arbitral process was preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that had been expressly acknowledged under the Act. Fifth, it was almost invariably the case that parties proposed diametrically opposite solutions to resolve a dispute. The Arbitrator, however, was not bound to adopt an either/or approach. Sixth, each case should be decided within its own factual matrix. it had to be always be borne in mind that it was not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied. These principles also applied to international arbitrations since the relevant provisions under the Act and under the International Arbitration Act (Cap 143A, 2002 Rev Ed) were in *pari materia*: at [42] to [65].

[82] The above formulations of the principle of limited curial interference under s. 24(2) for misconduct are no doubt narrow and limited. This was recognised in *Ong Guan Teck & Ors v. Hijjas*

Kasturi [1982] CLJ 31; [1982] CLJ (Rep) 616 at p. 619; [1982] 1 MLJ 105 at p. 106, where the very learned judge Hashim Yeop A Sani stated as follows:

> ... that the High Court may set aside an award only where an arbitrator or umpire has misconducted himself or the proceedings or the award had been improperly procured. The language of Section 24(2) would seem to be rather narrow and limited, In other words, the power of the High Court to set aside an award is restricted to cases where some form of dishonesty or bias is shown.

[83] The principle has obviously undergone reformulation over the years and the acid test is whether on an objective assessment of the case, it may be concluded that there was a miscarriage of justice such as would entitle a court of law to set aside an arbitration award.

[84] It is my considered opinion that the grounds of complaint that have been made by the plaintiff in the present application are very much in the nature of an invitation to treat this application as an appeal and to re-visit the merits of the plaintiff's claim against the defendant and to reverse all the findings and conclusions and the legal interpretations made by the substitute arbitrator.

[85] Ultimately, it was plain that the plaintiff had failed to discharge its burden of proving the value of work contractually completed by the plaintiff and this is *par excellence* a matter which falls within the province and jurisdiction of the substitute arbitrator and it is no part of this court's function to interfere with the decisions validly, honestly and properly made by the substitute arbitrator.

[86] Based on the case authorities referred to above, it is trite that even if the substitute arbitrator had made errors of fact or of law, that in itself would be insufficient for this court to exercise jurisdiction over the final award and to set it aside under s. 24(2) of the Arbitration Act 1952.

[87] As I said earlier, I was not able to detect any hint of bias or dishonesty or any manifestation of mishandling of the arbitral process and in my overall objective assessment of the case, it was obvious that there was no breach of natural justice and both sides were directed to adduce whatever relevant evidence that they thought was necessary to prove or disprove the plaintiff's claim as the case may be.

[88] In this regard, I may add that an inference of bias cannot be made merely because the interim rulings leaned largely in favour of the defendant. In any arbitration there will be rulings and decisions which will lean in favour of one side which can be challenged. In this case, a challenge was made by the plaintiff and was unsuccessful. But that does not mean that the challenge can be utilised as a basis for impugning the arbitrator's independence. And so the suggestion by the plaintiff that the substitute arbitrator could not be unbiased because of the challenge to the interim rulings and the plaintiff's application to remove him for misconduct, is to my mind misconceived. What the plaintiff was essentially suggesting is that because of the challenge made by the plaintiff, the substitute arbitrator became prejudiced.

[89] In my view, the plaintiff's suggestion is far fetched and is more in the nature of perception rather than reality. As I said, reasons were given in the final award for the decision(s) that were made by the substitute arbitrator and I have analysed them and found them to be well grounded both from an evidential and legal perspective. There is no hint of any bias or prejudice against the plaintiff.

[90] As I said earlier, the substitute arbitrator did not react to the harsh words used by the plaintiff in the various letters written to the substitute arbitrator. Instead, the substitute arbitrator remained stoic and unperturbed with the various allegations hurled against him. In short, the substitute arbitrator's conduct was in all the circumstances, exemplary and commendable. Needless to say, there was in fact no reason to use harsh words against the substitute arbitrator. But somehow the plaintiff seemed very predisposed to attacking the substitute arbitrator with language which I found to be lacking in decorum and civility.

[91] As such, despite the initial attractiveness of the plaintiffs argument predicated on *res judicata vis-a-vis* the finding by the original arbitrator that the plaintiff had accomplished 93.43% progress of works, I was ultimately impelled to the conclusion that the bifurcated nature of the arbitral proceedings and the agreement of the parties that damages was to be kept separate from liability, did not, in the present circumstances of this case, obviate the need for the plaintiff to prove by credible, cogent and convincing evidence that 93.43% progress of work equated to 93.43% of the contract value. All that the substitute arbitrator wanted was hard evidence from the plaintiff's side that 93.43% progress of work

equated to 93.43% of the contract value. But that evidence was not forthcoming. Hence, although the finding of 93.43% progress of works was *res judicata*, the issue of quantum was a separate matter and the plaintiff could not take refuge in the principle of *res judicata* to avoid proving the value or quantum of damages in Stage Two.

[92] As the substitute arbitrator had made a finding of fact as regards the plaintiff's failure to prove the amount of damages that was pleaded, the argument that the ruling in Stage One that progress of work was 93.43% was one of *res judicata* was to my mind nothing but a disingenuous attempt to mitigate the failure on the plaintiff's part to measure up to the level of proof required to satisfy the substitute arbitrator that 93.43% progress of work was at par with 93.43% of the contract value.

[93] In my view, even though the finding by the original arbitrator that progress of work was 93.43% and was *res judicata*, the principle of *res judicata* did not exempt the plaintiff from discharging their burden and onus of proof during the assessment of damages at Stage Two of the arbitration

[94] On the other hand, I find that the plaintiff's attempt *via* the present application to indirectly revisit the validity of the two interim rulings made by the substitute arbitrator which were upheld by the High Court in Originating Motion No. 25-60-2011 offends the principle of *res judicata* as the opportunity to challenge those rulings were taken up, ventilated and exhausted. The substitute arbitrator's rulings cannot be re-opened in the way that the plaintiff is seeking to do in this case.

[95] In the circumstances, I was of the view that at the end of the day this was nothing more than a case of failure on the part of the plaintiff to discharge their legal and evidential burden of proving their loss. Hence, I was impelled to the conclusion that the plaintiff's application to set aside the final award dated 14 November 2012 completely lacked merit and dismissed it accordingly. The plaintiff was also ordered to pay costs of RM30,000 to the defendant.